[redacted]

vs.

[redacted]

Defendants in Error.

No. 455.

Motion of Defendants in Error to dismiss Appeal and Brief in support of Motion.

S. M. STOCKSLAGER,
GEO. C. HEARD,
Attorneys for Defendants in Suit.

Supreme Court of the United States

OCTOBER TERM, 1898.

WILLIS THORP,
Plaintiff in Error.

vs.

S. W. BONNIFIELD, AND JOHN G. HEID,
Defendants in Error.

No. 455.

Motion of Defendants in Error to Dismiss Appeal

Now come the defendants' in error and move the court to dismiss the appeal herein for want of jurisdiction, as apparent from the Record, for the reasons:

1. As appears from the Record printed at the request of defendants in error, and which is made a part of this motion, the cause was tried in the United States District Court for the District of Alaska, by stipulation of the parties, without a jury, and it is sought to bring the cause into this court by writ of error, and not by appeal, as required by Sec. 2 of the act of April 7, 1874 (18, Stat. at L. 27).

2. This case was taken to the Circuit Court of Appeals for the ninth circuit, on writ of error. On a certificate from the court the question whether the court had jurisdiction of the case was on the 18th day of October, 1897, answered by this court in the negative. (168 U. S., 174.)

By a duly certified copy filed herewith, marked Exhibit "A," and made part hereof, it appears that a mandate was duly issued out of this court directed to said Circuit Court of Appeals for the ninth circuit, on the 1st day of December, 1897, commanding that court to take further proceedings in conformity with said opinion of this court. Said mandate was duly filed in the office of the clerk of said Court of Appeals, on the 6th day of December, 1897.

Afterwards, to wit, on the 3d day of January, 1898, on motion, in said Circuit Court of Appeals for the ninth circuit, said mandate was spread upon the records of said court, and in conformity with the decision of this court and said mandate, the writ of error was dismissed for want of jurisdiction.

Afterwards, to wit, on the 4th day of January, 1898, mandate issued out of said Court of Appeals for the ninth circuit, directed to the District Court of the United States for the District of Alaska, which mandate was, on the 3d day of February, 1898, duly filed in the office of the clerk of said court.

Afterwards, to wit, on the 10th day of February, 1898, in obedience to said mandate, the order of said Circuit Court of Appeals was duly entered and said writ of error was dismissed, all of which facts appear from a duly certified copy of said proceedings filed herewith, marked Exhibit "B," and made part of this motion.

And afterwards, to wit, on the 29th day of March, 1898, an execution issued out of said United States District Court for the District of Alaska, on the judgment rendered in said cause, directed to the

United States marshal for said district.

Pursuant to the commands of said execution the said marshal duly sold to John G. Heid the following described property:

All of the interest of the said defendant, Willis Thorp, of, in, and to the lode mining claims situate, lying and being near the head of Sheep Creek, in Harris Mining District, Alaska, to wit: an undivided one-fourth (¼) part or interest of, in, and to each, the Silver Bullion Lode Claim, the Hidden Treasure Lode Claim, and the Lucerne Lode Claim.

Afterwards, to wit, on the 14th day of June, 1898, said sale so made as aforesaid, was duly confirmed by said United States District Court for the District of Alaska, which said facts appear from the duly certified copy of said proceedings filed herewith, marked Exhibit "C," and made part of this motion.

From all of which facts it will be seen that at the date of the act of July 8, 1898, under the provisions of which this case was transmitted to this court, as appears from the Record, the writ of error from the Circuit Court of Appeals for the ninth circuit had been dismissed in conformity with the mandate of this court; and in obedience to the mandate of that court, the same was dismissed by the United States District Court for the District of Alaska, execution issued upon the judgment rendered, the real estate of Thorp sold thereunder and the sale confirmed by said District Court.

S. M. Stockslager,
George C. Heard,
Attorneys for Defendants in Error.

Brief in Support of Motion.

The defendants in error have had such portions of the Record printed as appear to be necessary to present the questions involved in the foregoing motion to dismiss the writ of error for want of juristion.

They have also filed with this motion certified copies of the proceedings of the courts which have been had since the writ of error was allowed, and hence could not be a part of the Record on file in this court.

ARGUMENT.

I.

As to the ground for the motion to dismiss, it is only necessary to invite the attention of the court to the statute (act April 7, 1884, Stat. at L. 27), and the decisions of this court construing the same, to show conclusively the court has no jurisdiction to consider this case, brought here on *writ of error* instead of by *appeal*, as required by the positive provisions of the statute.

The cases of Coquihlam *vs.* United States (163 U. S. 346), and Aztec Mining Co. *vs.* Ripley (151 U. S. 79), hold that the District Court of Alaska is to be regarded as the Supreme Court of the District.

In the case of Gregory Consol. Min. Co. *vs.* Starr (141 U. S. 222), this court held:

> "A case tried by a territorial court without a jury can be taken to the Supreme Court of the United States only by appeal. That court has no jurisdiction over such a case taken to it by writ of error."

To the same effect is the cases of Story *vs.* Black (119, U. S. 235), Rogers *vs.* United States (141, U. S. 548), Hecht *vs.* Broughton (105, U. S. 235), United States *vs.* U. P. R. R. Co. (105, U. S. 263), Stringfellow *vs.* Cain (99, U. S. 610).

Under the statute thus construed by this court, the writ of error should be dismissed for want of jurisdiction.

II.

The second ground for dismissal of the writ of error raises the question of the power of Congress to authorize the issuing of a writ of error, or the confirming of one erroneously issued, after the same had been dismissed by this court, the judgment in question become final, and execution issued thereon, upon which a sale of real estate was made and the sale confirmed by the lower court.

The act of July 8, 1898, provides for the transmittal by the clerk of the Circuit Court of Appeals for the ninth circuit to this court of the records of all cases pending in said Circuit Court of Appeals on and prior to the 30th day of December, 1897, of which this court would have had jurisdiction at the date of such appeals, if proper appeals had been taken and providing they should be deemed and treated as regularly filed in this court of the date of filing in the Circuit Court of Appeals.

Although this court had held on the 18th day of October, 1897, by its negative answer to the question certified by said Circuit Court of Appeals, that appeal would not lie to that court, and on the 1st day of December, 1897, issued mandate to said Cir-

cuit Court of Appeals in effect ordering dismissal of said writ, it was not so dismissed until January 3, 1898, and it may be insisted, therefor, that the writ was still pending on the 30th day of December, 1897.

But this retroactive law was not enacted until July 8, 1898, long after the writ was dismissed, the right of appeal forfeited and lost, the judgment made final, execution issued thereon, property sold thereunder, the sale confirmed, and the judgment satisfied to the extent of the amount bid for the land sold.

Has Congress the power, by a retroactive law to restore a right thus forfeited, especially after rights had vested under the judgment of the court prior to the date of the act?

This act, as applied to the case at bar, is unconstitutional and void upon either of the grounds, viz:

1st. Its interference with the powers of the judiciary; and,

2d. It impairs vested rights which had grown up under the protection and action of the courts in their interpretation of the former law.

The authorities are numerous to the effect that the legislature cannot confer a right to an appeal or writ of error in cases where no such right existed when judgment was rendered or when such right then existing has since become forfeited.

Beaupre *vs.* Horn, 13 Minn., 366;
Burch *vs.* Nerbury (N. Y.), 374;
Durham *vs.* Lewiston, 4 Me., 140;
Lewis *vs.* Webb, 3 Me., 326;
Hill *vs.* Sunderland, 3 Vt., 507;
Bates *vs.* Kimball, 2d Chip. (Vt.), 314.

Cooley in his work on Constitutional Limitations, Sec. 94, thus states the objection to such legislation:

> "The legislative action cannot be made to retroact upon past controversies, and to reverse decisions which the courts, in the exercise of their undoubted authority, have made; for this would not only be the exercise of judicial power, but it would be its exercise in the most objectionable and offensive form."

Black on Constitutional Prohibitions, Sec. 198, says:

> "On the same principle it is held that the legislature has no constitutional power to grant to a party litigant a right to an appeal or writ of error, in cases where no such right existed when judgment was pronounced, or when the right had been definitely forfeited."

In Pierce *vs.* Kitzmiller, 19 W. Va., 564, the court said:

> "If anything is self-evident in the structure of our government, it is that the legislature has no power to order a new trial or direct the court to order it, either before or after judgment. The power to order new trials is judicial, but the power of the legislature is not judicial. * * * The legislature has gone no further than to order a rehearing on the merits; but it is not more intolerable in principle to pronounce an arbitrary judgment against a suitor than it is injurious in practice to deprive him of a judgment, which is essentially his property, and to subject him to the vexation, rick, and expense of another contest."

In Davis *vs.* Menasha, 21 Wis., 421, it was held

> "An act which requires a court to grant a new trial in any case in which a final judgment has been rendered, when the period previously limited by law for moving to set aside such judgment or for taking an appeal or writ of error had expired before the passage of the act, is unconstitutional."

There is no difference in principle between granting a new trial and providing for appeal or writ of error, as, if appeal is allowed, a new trial may result.

The act is equally objectionable upon the ground that it would impair vested rights.

Cooley on Constitutional Law, at p. 332, says:

> "Rights are vested when the right to enjoyment, present or prospective, has become the property of some particular person or persons as a present interest."

That rights in the final judgment rendered prior to the date of the act of July 8, 1898, and in the property purchased at marshal's sale on the execution issued thereon, were vested at the date of said act will hardly be questioned.

That retroactive legislation will not be permitted to impair such vested rights, upon the ground that it would be taking the property of the citizen "without due process of law," seems well settled.

In Black on Constitutional Prohibition, Sec. 195, the doctrine is thus stated:

> "It cannot be allowed, by a retroactive operation, to alter or impair vested rights, which have grown up under the protection of the courts in their interpretation of the former law. To give it such construction would cause it to violate the constitutional guarantee which secures to every man his property, except as the same may be taken by 'due process of law.'"

In the American and English Enc. of Law, 2d Ed., p. 955, the doctrine is thus stated:

> "An act of the legislature which seeks to divest or impair vested rights of property is generally held to be unconstitutional and void."

In support of the text a long line of decisions, federal and State, are cited.

See also Railway Co. *vs.* Texas, 170 U. S., 243;
Angle *vs.* Chicago St. P. M. & O. Ry. Co., 151, U. S. 1;
Noble *vs.* Union River Logging Ry. Co., 147, U. S. 165.

We insist, therefore, that our second ground for dismissal of the writ of error is also fully sustained by authority.

Respectfully submitted,

S. M. Stockslager,
George C. Heard,
Attorneys for Defendants in Error.

EXHIBIT "A."

At a stated term, to-wit: the October Term A.D., 1897, of the United States Circuit Court of Appeals for the Ninth Circuit held at the court room in the city and county of San Francisco, on Monday, the third day of January, in the year of our Lord one thousand eight hundred and ninety-eight:

Present.

The Hon. WILLIAM W. MORROW, Circuit Judge;
The Hon. JOHN J. DEHAVEN, District Judge;
The Hon. HIRAM KNOWLES, District Judge.

WILLIS THORP,
Plaintiff in Error,
vs.
S. A. BONNIFIELD, *et al.*,
Defendants in Error.
No. 289.

On motion of Richard C. Harrison, Esquire, counsel for defendant in error, Ordered mandate of Supreme Court of the United States, heretofore filed spread upon the minutes of this court.

The mandate of the Supreme Court is in the words and figures following, to-wit:

"UNITED STATES OF AMERICA, *ss:*

The President of the United States of America.

[SEAL.]

To the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, GREETING:

Whereas, Lately in the said United States Circuit Court of Appeals before you, or some of you, in a cause between Willis Thorp, plaintiff in error,

and S. A. Bonnifield and John G. Heid, defendant in error, wherein a question arose which was certified under the seal of said United States Circuit Court of Appeals to the Supreme Court of the United States for its opinion; as by the inspection of the certificate of the judges of the said United States Circuit Court of Appeals, which was brought into the Supreme Court of the United States agreeably to the act of Congress in such case made and provided, fully and at large appears.

And, Whereas, In the present term of October, in the year of our Lord, one thousand eight hundred and ninety-seven, the said cause came on to be heard before the said Supreme Court, on the said certificate and was argued by counsel:

On consideration whereof, It is the opinion of this court that the question whether the said Circuit Court of Appeals has jurisdiction of this case, must be answered in the negative.

Whereupon, It is now here ordered by this court that it be so certified to the said United States Circuit Court of Appeals.

(October 18, 1897.)

You, therefore, are hereby commanded that such further proceedings be had in said cause, in conformity with the opinion of this court, as according to right and justice, and the laws of the United States, ought to be had, the said certificate notwithstanding.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the United States, the first day of December, in the year of our Lord, one thousand eight hundred and ninety-seven.

JAMES H. MCKENNEY,
Clerk of the Supreme Court of the United States."

(Endorsed:) "Mandate of Supreme Court U. S. Filed December 6, 1897, F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit."

On like motion, Lorenzo S. B. Sawyer, Esquire, appearing in opposition thereto, Ordered cause dismissed in accordance with mandate of the Supreme Court of the United States; and it is further ordered that the mandate of this court herein issue to the court below forthwith.

WILLIS THORP,
Plaintiff in Error,
vs.
S. A. BONNIFIELD AND JOHN G. REID,
Defendants in Error.

No. 289.
(Judgment.)

In Error to the District Court of the United States for the District of Alaska.

The Mandate of the Supreme Court of the United States, answering in the negative the question of the jurisdiction of this court over this case, having been upon motion of Richard C. Harrison, Esquire, counsel for the defendants in error, filed and spread upon the minutes of this court, and the court having upon like motion ordered that judgment be entered in accordance therewith,

It is now here ordered and adjudged by this court that the writ of error herein be, and the same is hereby dismissed, for want of jurisdiction.

WILLIS THORP, *Plaintiff in Error,*
vs.
S. A. BONNIFIELD, *et al.*,
Defendants in Error.

No. 289.

I, FRANK D. MONCKTON, clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing three pages, numbered from one to three, inclusive, to be full, true and correct copy of an order entered in the above entitled cause on January 3, 1898, as the origidal thereof remains and appears of record in my office.

ATTEST my hand and the seal of said Circuit Court of Appeals at San Francisco, California, this 8th day of March, 1899.

F. D. MONCKTON,
Clerk.

EXHIBIT "B."

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America,

[Seal.]

To the Honorable the Judges of the District Court of the United States, for the District of Alaska.—GREETING:

Whereas, lately in the District Court of the United States for the District of Alaska, before you, or some of you, in a cause between S. A. Bonnifield and John G. Heid, plaintiffs, and Willis Thorp, defendant, No. 439, a judgment was duly filed and entered in said cause in said District Court, which said judgment is of record in the office of the clerk of said District Court in the words and figures following, to wit:

In this action the defendant, Willis Thorp, having been duly and regularly served with summons and a copy of the complaint filed herein, and after demurrer of defendant to complaint herein having been overruled by the court, defendant had failed to appear and answer the complaint of plaintiffs filed herein, and the legal time for answering the said complaint having expired, and no other pleading having been filed, the default of the said defendant, Willis Thorp, in the premises having been duly entered according to law:

Now, at this day, on application of Johnson & Heid, attorneys for plaintiffs, it is hereby ordered that judgment be entered herein against the said defendant, Willis Thorp, in accordance with the prayer of said plaintiffs' complant on file herein.

Wherefore, by reason of the law and the premises aforesaid, it is ordered, adjudged, and decreed that S. A. Bonnifield and John G. Heid, plaintiffs, do have and recover of and from the said defendant, Willis Thorp, the sum of seven thousand two hundred thirty-one and 25-100 dollars ($7,231.25), lawful money of the United States of America, with interest thereon at the rate of eight per cent. per annum from the date hereof until paid; together with said plaintiffs' costs and disbursements incurred in said action, amounting to the sum of $33.55.

It is further ordered, adjudged, and decreed that said plaintiffs do have execution against the property of the said defendant.

By the court.

ARTHUR K. DELANEY,
Judge.

as by the inspection of the transcript of the record of the said District Court, which was brought into the United States Circuit Court of Appeals, for the ninth circuit, by virtue of a writ of error agreeably to the act of Congress, in such cases made and provided, fully and at large appears.

And whereas, the jurisdiction of this court to entertain the writ of error herein being disputed, and the court being in doubt concerning the true interpretation of section 15 of the act of March 3, 1891, establishing the Circuit Court of Appeals, the question of the jurisdiction of this court over this case was certified to the Supreme Court of the United States for determination, which question was answered in the negative, as appears from the mandate of the Supreme Court filed herein, December 6, 1897;

And, Whereas, In the present term of October, in the year of our Lord, one thousand eight hundred and ninety-eight, the said cause came on to be heard before the said Circuit Court of Appeals, on a motion of the defendants in error to dismiss the writ of error herein, and said motion was argued by counsel:

On consideration whereof, It is now here ordered and adjudged by this court that the writ of error herein be, and the same is hereby, dismissed for want of jurisdiction.

(Jan. 3, 1898.)

You, therefore, Are hereby commanded that such further proceedings be had in said cause, as according to right and justice, and the laws of the United States, ought to, be had, the said writ of error, notwithstanding.

Witness, The Honorable Melville W. Fuller, Chief Justice of the United States, the 4th day of January, in the year of our Lord, one thousand eight hundred and ninety-eight.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By MEREDITH SAWYER,
Deputy Clerk.

(Endorsed.) No. 289. United States Circuit Court of Appeals, for the Ninth Circuit. October term, 1897.

Willis Thorp, Pl'ff in Error, *vs.* S. A. Bonnifield, *et al.*

MANDATE.

Filed Feb. 3, 1898. Albert D. Elliot, Clerk.

UNITED STATES
DITRICT OF ALASKA, } *ss:*

I, Albert D. Elliot, clerk of the United States District Court for the District of Alaska, do hereby certify that the foregoing is a full, true, and correct copy of mandate in aforesaid cause, as fully as the same appears on file at my office and in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Juneau, in said district, this 27 day of March, A. D. 1899.

ALBERT D. ELLIOT,
Clerk.

[SEAL.]

By *Deputy Clerk.*

(Journal No. 6, page 378.)

JUNEAU, THURSDAY, *February* 10, 1898.

S. A. BONNIFIELD and JOHN G. HEID *vs.* WILLIS THORP. } No. 439.

The mandate of the Circuit Court of Appeals for the 9th Circuit having been filed herein on the 3d day of February, 1898, and being now considered, and it appearing that said Circuit Court of Appeals, on the 4th day of Jannary, 1898, ordered and adjudged that the writ of error in this case, from this court to the said Court of Appeals, be dismissed.

Now, therefore, In obedience to said mandate, the order of the said Circuit Court of Appeals is hereby entered and said writ of error dismissed.

UNITED STATES DISTRICT OF ALASKA, } *ss:*

I, Albert D. Elliot, clerk of the United States District Court for the District of Alaska, do hereby certify that the foregoing is a full, true, and correct copy of order dismissing writ of error in aforesaid cause, as fully as the same appears of record, at my office and in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Juneau, in said district, this 27 day of March, A. D. 1899.

ALBERT D. ELLIOT,
Clerk.

[SEAL.]

By *Deputy Clerk.*

EXHIBIT "C."

IN THE UNITED STATES DISTRICT COURT, FOR THE DISTRICT OF ALASKA.

S. A. BONNIFIELD and JOHN G. HEID, *Plaintiffs*, *vs.* WILLIS THORP, *Defendant*, } No. 439. Order confirming sale

An execution having issued out of this court on the 29th day of March, 1898, in the above entitled cause, directed to the United States Marshal for Alaska, commanding him, out of the property of the above-named defendant, to satisfy the judgment obtained by the above-named plaintiffs against the said defendant, Willis Thorp, that is to say: The share of said judgment belonging and due to said John G. Heid, one of the plaintiffs herein, amounting to the sum of sixteen hundred and sixteen dollars and eighteen cents, together with interest and costs; and the said United States Marshal having filed in this court a return of his proceedings, annexed and endorsed upon the said execution, as required by law, on this 2nd day of June, 1898, and the court having examined the said return, and it duly appearing to the satisfaction of this court;

That in pursuance of said execution, the said marshal caused due and sufficient notice of the time and place of holding said sale to be posted up in three of the most public places in the town of Juneau, Alaska, and to be published in the "Alaska Mining Record," a weekly newspaper, printed and published in the said town of Juneau, Alaska, for four successive weeks next before such sale, in which notice the lands and tenements to be sold were de-

scribed with common certainty ;

That at the time and place of holding such sale, specified in said notice, the said marshal caused to be sold in one parcel, at public auction at the front door of the court-house, in the said town of Juneau, Alaska, to the highest bidder, the whole of the lands and mining premises described in said marshal's return of sale and in said notice, to wit :

All of the interest of the said defendant, Willis Thorp, of, in, and to the lode mining claims situated, lying, and being near the head of Sheep Creek, in Harris Mining District, Alaska, to wit: An undivided one-fourth (¼) part or interest of, in, and to each, the Silver Bullion Lode Claim, the Bullion Lode Claim, the Ready Bullion Lode Claim, the Fraction Lode Claim, the Hidden Treasure Lode Claim, and the Lucerne Lode Claim ;

That at such sale the said John G. Heid, one of the plaintiffs hereinbefore named, and the judgment creditor of said defendant, Willis Thorp, became the purchaser of said lode claims and mining premises for the sum of two hundred dollars ($200.00), he being the highest and best bidder, and said sum being the highest and best sum bid ;

That the said sale was legally made and fairly conducted, and that the said marshal in all things proceeded, and conducted and managed such sale as by the statute in such case made and provided, and by said execution is directed and required ;

And no objections to the confirmation of said sale being made or filed : Now, on motion of H. L. Ball, attorney for the said John G. Heid, plaintiff ;

It is hereby ordered, adjudged, and decreed, that

the said sale be, and the same is hereby, confirmed and approved, and declared valid.

And the proper and legal conveyance of said lode claims and mining premises are hereby directed to be executed to said purchaser at the expiration of two months from the date hereof.

Done in open court this 14th day of June, 1898.

CHARLES S. JOHNSON,
Judge.

(Endorsed:) No. 439. In the U. S. Dist. Court, District of Alaska.

S. A. Bonnifield and John G. Heid, Plaintiffs, *vs.* Willis Thorp, Defendant.

Order confirming sale.

Filed June 14th, 1898. Albert D. Elliot, Clerk.

UNITED STATES
DISTRICT OF ALASKA, } *ss:*

I, Albert D. Elliot, clerk of the United States District Court for the District of Alaska, do hereby certify that the foregoing is a full, true, and correct copy of order confirming sale in aforesaid cause, as fully as the same appears of record and on file, at my office and in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Juneau, in said district, this 27 day of March, A. D. 1899.

ALBERT D. ELLIOT,
Clerk.

[SEAL.]

By *Deputy Clerk.*

No. 153.

Brf. of Stockslager v.

Filed Jan. 3, 1900.

Supreme Court of the United States.

OCTOBER TERM, 1899.

WILLIS THORP,
Plaintiff in Error,
vs.
S. A. BONNIFIELD & JOHN G. HEID,
Defendants in Error.
} No. 153.

Brief of Defendants in Error in Support of Motion to Dismiss and also on the Merits.

S. M. STOCKSLAGER,
GEORGE C. HEARD,
Attorneys for Defendants in Error.

Supreme Court of the United States.

OCTOBER TERM, 1899.

WILLIS THORP,
Plaintiff in Error,
vs.
S. A. BONNIFIELD & JOHN G. HEID,
Defendants in Error.
No. 153.

Brief of Defendants in Error in Support of Motion to Dismiss and also on the Merits.

The Motion to Dismiss Appeal.

A motion to dismiss the appeal for the reasons therein given, accompanied by certified copies of the proceedings subsequent to the attempted appeal to the Court of Appeals of the Ninth Circuit, and a brief in support of the motion, were filed in the office of the Clerk of this Court, with proof of service, on the 21st day of April, 1899.

Brief in answer was field by counsel for plaintiff in error in May, 1899.

The consideration of the motion was postponed by the Court until the case is reached on the merits.

Before proceeding to the argument on the merits, we invite the attention of the Court to some of the points urged by counsel for plaintiff in error, in his brief in opposition to that motion.

I.

Our motion to dismiss the appeal for want of jurisdiction of the subject matter of the action was based upon two grounds:

First. The invalidity or unconstitutionality of the Act of July 8, 1898, under which the case was brought to this Court after the expiration of the time for appeal and the issue of execution on the judgment, the sale of the property of the defendant and the confirmation by the Court of the sale, so made.

Second. Want of jurisdiction of the Court, because the case having been determined by the United States District Court for the District of Alaska, without a jury, could be brought to this Court, under the Act of April 7, 1874 (18 Stats., 27), by appeal only and not by writ of error as attempted here.

Counsel insists that defendants in error are estopped from urging as a ground for dismissing the appeal, the want of jurisdiction of the Court because the case was brought to this Court on *writ of error* instead of by *appeal*, for the reason that such was not urged in the motion to dismiss in the Court of Appeals.

The rule is, as we understand it, that jurisdiction of the subject matter cannot be waived, and may be raised at any stage of the proceedings.

II.

Counsel also urges that the Act of April 7, 1874, invoked by us, does not apply to this case because the United States District Court for the District of Alaska is not a "Territorial Court," within the meaning of said Act.

It has been held by this Court that such court is a Territorial Court and does fall within the provisions of said Act. Coquitlam *vs.* The United States (163 U. S., 346), and Aurora Mining Company *vs.* Ripley (151 U. S., 79).

III.

Counsel also urges that the motion to dismiss should be denied because the grounds stated are all waived by the general appearance entered by us for defendants in error in this Court.

But, as before stated, while jurisdiction of the person might be thus waived, jurisdiction of the subject matter cannot be waived. No action of the parties can give the court jurisdiction when it has none. (Freeman on Judgments, Section 120.)

All of the grounds for dismissal urged in the motion go to the jurisdiction of the court, the case being brought to this Court on writ of error, under the provisions of the Act of July 8, 1898.

Additional Ground for Dismissal of Appeal.

An examination of the complaint shows that nine-sixteenths of the net profits arising from the operation, by plaintiff in error, of the Aurora Mine, upon lease from defendants in error, claimed by said defendants in error as due them, belonged to them in the proportion of seven-sixteenths to Bonnifield and two-sixteenths to Heid. (Rec., p. 1.)

Judgment was rendered, as claimed, on default of plaintiff in error, January 25, 1896, for $7,231.25. (Rec., p. 36.)

On the 28th day of January, 1896, Bonnifield entered full satisfaction of so much of said judgment as belonged to him, claiming that it was seven-eighths thereof. (Rec., p. 50.)

This left but one-eighth, or $903.95 of said judgment unpaid and unsatisfied, on the said 28th day of January, 1896.

The writ of error was asked for and granted on the 10th day of February, 1896, or thirteen days after this satisfaction was entered. (Rec., pp. 54 and 59.)

It follows that the whole amount involved at tho date of the granting of the writ was but $903.95, which is less than the amount required by law to authorize the bringing of the case to this Court on writ of error or appeal, and the writ should be dismissed for this reason.

Statement of Case on the Merits.

The defendants in error held a lease of the Aurora Lode mining claim, in Alaska, with the right to work and mine the same until April 24, 1896. This lease was transferred or assigned to plaintiff in error on June 26, 1894, with all the privileges and rights of defendants in error therein, for a term ending December 31, 1894, subject to the payment by said plaintiff in error of a certain mortgage for $3,686.59, and all claims then outstanding against said premises contracted by Bonnifield and Runkle, former lessees, and agreed to pay to said defendants in error nine-sixteenths of the net profits or proceeds derived by said plaintiff in error in working and mining said claim and milling the ore extracted or mined therefrom, during said term in the proportion of seven-sixteenths to Bonnifield and two-sixteenths to Heid.

Under said lease he extracted and took from said mine gold of the value of $32,000 and concentrates of the value of $3,500 which he sold and disposed of.

The cost and expense of mining, operating and extracting said gold and ore was $23,000, which sum includes $200 advanced by Bonnifield and not repaid by said plaintiff in error, *leaving a balance of profit or net proceeds of $12,500.* Nine-sixteenths of which said sum, to-wit: $7,231.25 due and owing defendants in error.

On the 15th day of April, 1895, the defendants in error

filed complaint alleging the foregoing facts and asking for judgment for said sum of $7,231.25.

Summons was issued and duly served on the plaintiff in error, who, on the 4th day May, 1895, appeared by Bostwick & Crews, his attorneys, and filed motion for order requiring defendants in error to make their complaint more specific, which motion was sustained and the complaint amended in accordance with said order. Whereupon, plaintiff in error filed demurrer to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action.

On the 3d day of December, 1895, the Court overruled said demurrer, to which ruling of the Court plaintiff in error excepted, and he was given until Monday, December 23, 1895, to file his answer to said complaint. Afterwards, on the 26th day of December, 1895, the time for filing said answer having expired and no answer having been filed, on motion of attorneys for defendants in error, in open court, default of said plaintiff in error was entered.

And afterwards, to-wit: on the 10th day of January, 1896, after service of notice, said plaintiff in error filed a motion for an order vacating, setting aside, and holding for naught the order of default theretofore granted, together with all subsequent proceedings, and allowing him further time in which to prepare, serve and file his answer, for the reasons in said motion alleged; which motion was by stipulation, submitted to the Court upon the affidavits and all of the papers, files, records and proceedings had and done in the cause, without argument.

On the 25th day of January, 1896, the Court overruled said motion (Rec., p. 29), and on the same day judgment was rendered by default, in favor of defendants in error, for the sum demanded in their complaint, viz., $7,231.25 (Rec., p. 36).

On the 10th day of February, 1896, plaintiff in error filed notice of motion for order vacating and setting aside said judgment and the execution issued thereon January 25, 1896 (Rec., p. 37). This motion was, on the 10th day of February, 1896, overruled by the Court, with the statement that defendants in error would be given until February 25, 1896, to file affidavit to show no error existed in the computation of the amount of the judgment (Rec. p. 50).

And on the said 25th day of February, 1896, in accordance with the requirement of the Court, defendants in error filed the affidavits of said John G. Heid and of their attorneys, C. S. Johnson and John F. Maloney, all showing the correctness of said computation (Rec., p. 59).

Whereupon on the said 25th day of February, 1896, plaintiff in error filed motion to strike said affidavits from the files, which motion was overruled by the Court and exception taken and allowed by the Court (Rec., p. 68).

On the 10th day of February, 1896, writ of error to the said District Court of Alaska, transferring said cause to the Circuit Court of Appeals, was granted, and citation issued and served upon said defendants in error (Rec., pp. 57 and 58).

Bill of exceptions was signed by the Hon. Arthur K. Delaney, judge of said court, and filed February 25, 1896.

Upon certificate of the Circuit Court of Appeals of the Ninth Circuit this court held appeal would not lie to said Circuit Court of Appeals (168 U. S., 174).

Afterwards, to wit: On the sixth day of September, 1898, on motion, the record in said cause was transmitted to this Court by the clerk of said Circuit Court of Appeals for the Ninth Circuit, pursuant to the provisions of the Act approved July 8, 1898, providing for the transfer of certain causes from that court to this Court, where it was filed October 25, 1898.

ARGUMENT.

I.

The Sufficiency of the Complaint.

Counsel insists the complaint is insufficient because it fails to show the amount of "other outstanding claims," which, under the agreement, plaintiff in error was to pay, and that after deducting such amounts, there was net profits to the amount claimed. In other words, that the complaint fails to show any surplus in the hands of plaintiff in error.

We do not think this contention is sound. The demurrer admits the facts stated in the complaint, which are that plaintiff in error took out gold and concentrates which he sold for $35,500, and that the whole expense of mining and milling said gold and ore was $23,000, leaving a balance of net profits or proceeds of $12,500. This is certainly a sufficient statement of the fact that a surplus existed and the precise amount of it. It could not have been better or more definitely pleaded. If other payments had been made, this was clearly a matter of defense. The defendants in error were not required to plead alleged facts, which, if they existed, were matters to be set up in defense. They were not required by any rules of pleading to give plaintiff in error credit for any payments which he claims to have made. We think, therefore, the complaint was sufficient to constitute a cause of action and the objections thereto are not well taken.

II.

The second error alleged is, in granting default without notice to plaintiff in error.

Under the act of Congress of May 17, 1884, the Code of Oregon is made applicable to the case. But we do not think the sections of Hill's Oregon Code, set out by counsel in his

brief, require any such notice. And, we are not aware of any rule of code pleading which requires notice of a motion made in open court to take default against parties who fail to file their pleadings within the time limited by the court therefor. In fact, the court might, of its own motion enter such default. Certainly plaintiff in error, was not entitled to notice of his own failure to comply with an order or rule of the court, made upon him in open court. The mere fact of his failure to comply with the order and file his answer within the time allowed therefor of itself worked a default, and it was only necessary to enter the same of record. Hill's Oregon Code, Note, p. 333 ; Barron *vs.* Deleval, 58 Cal., 95.

III.

Error in refusing to set aside the default upon the application and showing made by Thorp.

We beg to invite the attention of the Court to the very able and exhaustive opinion of the trial judge, in overruling the motion of plaintiff in error to set aside said default, and to the decisions cited by the court in support of his ruling.

Counsel in this Court has abandoned the principal contention of counsel below, viz, that the consent of one of the defendants in error for the filing of the answer after the expiration of the time given by the court, obtained after one of the parties, and the attorneys for both, had refused to grant further time, gave him the right to file it after the expiration of the time fixed by the Court. He rests his case upon the ground that the failure by the attorneys to file answer under the circumstances shown by the record, was such mistake, inadvertence, surprise or excusable neglect, as under the Oregon Code, should have been relieved against, upon the said motion. The section of the Code upon which

counsel relies is Section 102, Hill's Code of Oregon, pp. 242 and 243.

This section provides that the Court may, in its discretion, "relieve a party from a judgment, order or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect."

The only question here is, did the Court so abuse his discretion in refusing to set aside the default under the showing made in this case, as to justify this Court in reversing and setting aside all subsequent proceedings in the case? We think not.

As stated by the Court, the only evidence submitted in support of the motion was the affidavit of H. Bostwick, one of the attorneys for Thorp, who swore, that until he examined his docket on the morning of December 23, 1895, he was under the impression that he had sixty days in which to answer, but that he learned the time was out on that day, that he called at the office of Johnson & Heid about 10 o'clock that day, but did not find either of them in, that *he was engaged in his office the remainder of that day and did not have a chance to see said attorneys until the next morning*, when he saw Johnson going to the Juneau wharf with a grip; that he spoke to him and mentioned the fact that the time for answer had expired and wanted Johnson to extend it, and that Johnson referred him to Heid, who was one of the defendants in error; that he prepared a stipulation and went to the office of Johnson & Heid, where Mr. Heid refused to extend the time; that he stated to Heid unless they gave him time to answer, it would compel him to go to Sitka and get an order of court; that thereafter, about 2.30 P. M., he saw Bonnifield, one of the defendants in error, who signed with attorneys for plaintiff in error, a stipulation extending the time to answer to March 1, 1896; that it was then too late to reach the mail steamer; that the default was taken through mistake, inad-

vertence and neglect, as set forth; that he *relied upon the stipulation, and therefore did not go to Sitka to get the extension*, and also upon the fact that the attorneys for Heid knew full well that he intended to answer and would not take a default. He also swore *Thorp had fully stated the facts to him*, and from such facts he believed he had a good and substantial defense on the merits.

Upon this evidence the Court found there was no such mistake, inadvertence, surprise or excusable neglect as to authorize the setting aside of the default taken and entered; holding that there was ample time between 10.30 A. M. and 2.30 P. M. December 23d, when Bostwick swore he met Johnson apparently going to the wharf to take the mail steamer to Sitka, for counsel for plaintiff in error to have also taken the steamer, it appearing that, even at 2.30 P. M., the boat was still at Douglass Island (reached from Juneau by ferry boat), although the ferry boat had at that time left Juneau.

There certainly was no abuse of the discretion of the Court in refusing to set aside, upon this showing, the default taken and entered. That the ruling is correct, it seems to us, is perfectly clear. White *vs.* White, 169 Mass. (47 N. E., 499).

"Unless there is an abuse of the sound legal discretion with which the court is clothed, courts will not interfere."

Black on Judgments, 354; Freeman on Judgments, 441; Howe *vs.* Collins, 4 Nev., 172; Harper *vs.* Mallory, 4 Nev., 449; State *vs.* Mining Co., 3 Nev., 194; Ewing *vs.* Jennings, 15 Nev., 381; Gaines *vs.* Erlanger, 86 Cal., 60; Underwood *vs.* Underwood, 87 Cal., 523; Wylie *vs.* Sierra Gold Co., 120 Cal., 485; Rouley *vs.* Murray, 69 Ill. App., 428; Stafford *vs.* McMillan, 25 Wis., 566; Bertline *vs.* Bauer, 25 Wis., 486.

There was no mistake; but there certainly was neglect and it was not caused by surprise, or inadvertence; there was therefore no *excusable neglect*. Bostwick's affidavit shows clearly that after his attention was called to the fact that he had but twenty days within which to file his answer, there was, by his own showing, ample time to have taken the boat and gone to Sitka, and in the language of the court, "have prevented the entry of the order." He also states that his client had put him in possession of the facts upon which his defense was based. How, then, can it be said that there was any excuse for his negligence? There was none. It was totally *inexcusable* and *indefensible*. If, instead of seeking to circumvent the attorneys of the defendants in error, who refused to extend the time to answer, when seen at about 10 o'clock in the morning of the day the boat left Juneau for Sitka, by hunting up one of the defendants in error and secretly getting him to sign a stipulation to extend the time, and thus quietly resting and relying upon the advantage of the attorneys so obtained, he had been diligent in the discharge of his duty and taken the boat which Johnson took he could have avoided all the trouble and protected his client's claimed rights. But no, he relied, as he says, upon this stipulation and the good nature of the attorneys whom he was seeking to take advantage of, they having refused to extend the time. The sequel shows he was relying upon a stipulation without force, and that he had no right to rely upon the indulgence of attorneys for defendants in error who had no just right, looking to the interest of their clients, to waive a legal advantage gained by the carelessness and inexcusable neglect of counsel for plaintiff in error. It is not the province of the courts to reward the slothful, at the expense of those who are diligent, but quite the contrary.

As to the suggestion that Johnson concealed from Bostwick, on the morning of December 23d, the fact that he was

on his way to Sitka, an examination of Bostwick's affidavit does not bear any such construction. He says when he accosted Johnson, who had a grip in his hand, as to where he was going, he told him to the wharf. For what purpose would he be going to the wharf, except to take the boat, which all knew was bound for Sitka?

But, counsel insists that under the ruling of the Supreme Court of Nevada in Horton *vs.* New Pass Gold and Silver Mining Company (27 Pac., 376), from which he quotes at length, his client should not be made to suffer for the neglect of the attorney, who failed to file his answer within the time allowed by the Court therefor.

This contention assumes that the carelessness and negligence of the attorney, is not the carelessness and negligence of the client. That even though the attorney may violate or neglect to comply with the order of the Court, and thus put his client in default, the default must be set aside, if the client can show that he was not guilty of negligence. Such a rule would require the Court to deal with both the attorney and his client in the proceedings in Court, and although one might be in default, if the other was not to blame therefor, relief must be granted. This certainly cannot be the correct rule, but neglect of the attorney must be held to be neglect of the party. Spaulding *vs.* Thompson, 74 Am. Dec., 221 (12 Ind., 477).

In Smith *vs.* Tunstead, 56 Cal., 177, the Supreme Court of that State said:

"The party was not negligent, but the attorneys were, and parties in this State are held not entitled to relief on account of negligence of their attorneys."

In Freeman on Judgments, Section 112, the learned author says:

"The neglect of an attorney is uniformly treated as the neglect of the client, except in New York."

The client is bound by the acts of his attorney, or his failure to act, and must look to the attorney for relief, the rule being that the attorney is liable to his client for any failure to prepare pleadings and take necessary steps to protect his interests, if by such delay or failure his client's rights are prejudiced. Am. & Eng. Enc. of Law, 2d Ed., Vol. 2, p. 382.

He has had his day in court and he will not be heard to complain.

Daring *vs.* Quimay, 26 Oregon, 558.

We invite attention, in this connection, to the list of authorities cited by Justice Murphy, in his dissenting opinion in the case of Horton *vs.* New Pass Gold and Silver Mining Co., *supra*, which case is relied upon by counsel for plaintiff in error.

The motion might have been properly overruled by the court because of the failure of plaintiff in error to submit with the motion copy of the verified answer which he proposed to file, so that the court might judge whether he had a meritorious defense. Bailey *vs.* Williams, 6 Oregon, p 63; Superior Con. Land Co. *vs.* Dunphy, 83 Wis., 188 (67 N. E., 428); Norton *vs.* Hixon, 25 Ill., 439; Mayer *vs.* Mayer, 27 Oregon, 133.

There having been no abuse of discretion shown, the motion to set aside the default was properly overruled.

IV.

The fourth and fifth assignments of error may be considered together, and are stated by counsel as follows:

"Error in grantiug and entering judgment on default without proof and without notice or application."

Section 263 of Hill's Oregon Code provides that:

"When judgment is given for want of an answer, the entry shall state substantially that the defendant has been duly served with the summons and has failed to answer the complaint."

All these requirements were fully complied with in this judgment. We have been unable to find any statutory provision, or rule of practice, requiring notice to be given or application made, for judgment by default. After the defendant is defaulted it would hardly seem to be necessary to give him notice of the entry of judgment based upon his default, and certainly he is not in a position to demand it.

As to the objection that no application was made, while not conceding any was necessary, the record shows the judgment was granted and entered "on application of Johnson & Heid, attorneys for plaintiff." (Rec., p. 37.)

As to the alleged error in rendering judgment without proof, an inspection of the record will show it fails to bear out this charge.

It is conceded the record is silent as to what kind or quality of evidence, whether oral or record, or both, was introduced. But we do not think the Court was required to set out such fact in the judgment. Certainly the Oregon Code, by which the case is governed, does not make any such requirement.

Section 260 of Hill's Oregon Code provides:

"All judgments shall be entered by the clerk in the journal, and shall specify clearly the amount to be recovered, the relief granted, or other determination of the action."

But there is nothing which would require the judgments to show upon what evidence the "determination of the action" was arrived at by the court.

Freeman on Judgments, Sec. 2, states the requirement as follows:

"A judgment should be a simple sentence of the law upon the ultimate facts admitted by the pleadings or found by the Court (citing) Gregory *vs.* Nelson, 41 Cal., 248."

Where judgment was entered upon a default for $124.75 and it did not appear that any testimony had been heard, the presumption that a judicial officer has acted regularly was held to apply to the case, and nothing appearing to the contrary, this Court will presume that the judge had informed himself as to the matter of complaint in a proper and regular manner, and such judgment will be affirmed.

Crane *vs.* Brannan, 3 Cal., 192.
Dimick *vs.* Campbell, 31 Cal., 238.
Jarvis *vs.* Blanchard, 6 Mass., 4.

The rule is also that every intendment in favor of a judgment rendered by a Court having jurisdiction will be indulged.

Groslouis *vs.* Northcut, 3rd Oregon, 394.

"A judgment of a Court will always be presumed to be regular."

Wilson *vs.* Wilson, 18 Ala., 176; Venable *vs.* McDonald, 4 Dana (Ky.), 336; Green *vs.* Creighton, 15 Miss. (7 Smed. and M.), 197; Pardan *vs.* Felts, 10 Miss. (2 Smed. and M.), 535; Briggs *vs.* Clark, 8 Miss. (7 How.), 457; Coleman *vs.* McKnight, 4 Mo., 83.

But, was proof necessary in this case? This action was based upon a written assignment by defendants in error to plaintiff in error of their lease of the Aurora Lode mine, for a portion of their term, upon terms and conditions in said

assignment fully set out. It was alleged the plaintiff in error went into possession and operated said mine under said assignment, taking out a large quantity of gold and ore, and refused to pay over to defendants in error the portion of the net profits to which they were entitled under said assignment of their said lease. These facts were admitted by the default.

It is thus seen it is not a case "sounding in damages or tort," but rather, an action "arising upon contract for the recovery of money."

Now, by subdivision 1, of Sec. 249, Vol. 1, Hill's Annotated Laws of Oregon, it is especially provided that the clerk may, upon the application of the plaintiff, enter default and follow it immediately by judgment, *without proof*, "in an action arising upon contract for the recovery of money or damages only, if no answer has been filed with the clerk of the court within the time specified in the summons, or such further time as may have been granted by the court or judge thereof."

Again, the summons issued and served in the case at bar notified the plaintiff in error that if he did not appear and answer, the defendants in error would take judgment against him in the sum of $7,231.25. (Rec., p. 8.)

The case of Hartman *vs.* Williams, 4th Oregon, 254, settled the practice in this class of cases. That was an action for the violation of a verbal contract, to employ plaintiff and wife and find them house room and board for one year. The breach complained of, was their discharge by defendant prior to the expiration of the year, by which they suffered damages, by having been thrown out of employment, deprived of board and shelter and injured in various and divers ways, to the amount of $3,711.75. The summons notified defendant below if he failed to appear and answer, plaintiff would take judgment for $3,711,75. The defend-

ant having defaulted judgment was rendered for that sum, and on appeal the court say :

"The only question necessary to consider is whether a judgment, final by default, can be rendered properly upon an unliquidated demand. The practice is a new one, and appeared at first unfavorably. Upon an examination however, of Sec. 150 of the Practice Act, there remains no doubt as to its correctness, and when it is generally understood, we see no danger to be apprehended from it. The defendant being notified in the summons, of the amount for which the plaintiff will take judgment, is saved the necessity and expense, if he has no defense, of appearing to the action, to protect himself against an improper recovery; while on the other hand, the plaintiff avoids the delay and trouble of resorting to the writ of inquiry, for the purpose of having his damages assessed."

See also the case of Daniel *vs.* Campbell, 31st Cal., p. 239.

While we are aware this is not strictly speaking a default case, that is one where the defendant failed to appear in answer to the summons, but one where, after appearing and demurring to the complaint, which demurrer was overruled, he failed to discharge the rule or order made against him to file his answer within the time allowed therefor by the court. As we understand it, the rules and principles governing the one are applied to the other. In fact, there seems to be a greater reason for thus allowing the entry of judgment without writ of inquiry, in a case like the one at bar where the defendant was not only notified in the summons of the amount for which the plaintiffs would take judgment, but he appeared, examined and tested the complaint which notified him of the same fact, and in addition informed him of all of the grounds upon which the claim for judgment was based. He thus had actual knowledge of the amount for which judgment was claimed and of plaintiff's whole case.

In this connection we beg to call the attention of the

Court to the case of Clemente *vs.* Berry, 11th How., p. 397, decided by this Court, Mr. Justice McLean delivering the opinion of the Court.

VI.

The sixth and last objection urged by counsel is based upon the refusal of the Court to vacate and set aside final judgment on the showing made.

The motion to vacate the judgment was supported by the affidavit of H. Bostwick and W. E. Crews, attorneys, and by S. A. Bonnifield, accompanied by a verified answer.

The facts as to negligence are stated in the affidavits of the attorneys substantially as in the affidavit of Bostwick in support of the motion to set aside the default.

There is an attempt, by the answer of Thorp and the affidavits of the attorneys, to show that there should have been a judgment for plaintiff in error for $2,934 instead of for $7,231.25 for defendants in error. But they contradict their paper theory of the case by filing the affidavit of Bonnifield, to the effect that after rendition of judgment he had settled with Thorp, who paid him for his one-eighth interest the sum of $800.

This apparently raised some doubt in the mind of the Court as to whether the computation upon which the judgment was based was correct, and he gave defendants in error time to file affidavits showing it was correct. Within the time allowed therefor, defendants in error filed the affidavits of John G. Heid, Judge C. S. Johnson, and John F. Maloney, in contradiction of the affidavits of Bostwick and Crews, as to many of the facts stated by them, and also sustaining the correctness of the computation upon which the judgment was based, Heid and Maloney swearing that they had carefully gone over all the papers, including all the vouchers furnished them by Thorp, and that the amount

was correct. They also fully explained the conduct of Bonnifield in connection with the whole case and the reasons given by him to Johnson for his action. Motion was made by plaintiff in error to strike these affidavits from the files, which was overruled by the Court. And the Court being satisfied with the amount of the judgment, no further order or proceedings were had. Counsel is mistaken, therefore, in his statement that no showing was made as to the correctness of the amount for which judgment was rendered. He evidently overlooked this part of the record of the proceedings (Rec., p. 59).

All that was said under assignment 3 may be considered also in connection with this assignment.

In the case of Foster *vs.* Jones, 1st McCord (S. C.), 116, it was said :

"It is difficult to foresee all the consequences which might result from permitting a party, after judgment and execution, to set aside the proceedings against him on the ground of negligence or ignorance of the attorney. It would very much tend to destroy all rules of pleading, and produce endless litigation."

In the later cases decided by the Supreme Court of Oregon, involving the question of the discretion of the Court in setting aside, or refusing to set aside, judgments rendered by default, under Sec. 102 of Hill's Code, it is said:

"Action of the trial court in refusing to set aside a default judgment on the ground of excusable neglect under Sec. 102 of Hill's Code, is discretionary, and will not be disturbed only for manifest abuse. (Lovejoy *vs.* Willamette Lock Company, 24th Oregon, p. 569 ; Askren *vs.* Squire, 29th Oregon, p. 228.)"

We insist the record shows there was no abuse of the discretion with which the Court was clothed, either in overruling the motion to set aside the default of the plaintiff in

error entered because of his failure to file answer within the time allowed therefor by the Court; or in overruling his motion to set aside the judgment by default rendered against him and the execution issued thereon, upon the showing made by him in support of his motion.

There being no error in the record we ask that the judgment of the United States District Court for the District of Alaska be in all things affirmed.

Respectfully submitted,

S. M. STOCKSLAGER,

GEORGE C. HEARD,

Attorneys for Defendants in Error.

WASHINGTON, D. C., *December 11, 1899.*